Comments

American Defamation Law: From *Sullivan*, Through *Greenmoss*, and Beyond

I. INTRODUCTION

James Madison once said, "some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than in that of the press."[1] The law of defamation and this Note concern themselves with some of these abuses.[2] The law of defamation serves to protect a person's reputation from publicized falsehoods which harm that reputation.[3] Some form of defamation law has existed in the common law since early English canon law, prior to the Norman conquest.[4] For over a thousand years, the common law has continued to protect a person's good name from false statements.[5]

In 1964, the United States Supreme Court, in *New York Times v. Sullivan*,[6] first found that the interests of the first amendment conflicted with and limited state defamation law.[7] According to the Court's findings, juries too often were punishing defendants for the unpopularity of the content of the views expressed, rather than the damage caused by a false and defamatory statement.[8] The Court also found that legitimate speech would be "chilled" for fear that a small factual error could lead to a large damage award for a plaintiff.[9] During the twenty-one years following *New York Times*, the state courts have attempted to weigh the public interest of free and unfettered speech against the state's interest in protecting its citizens' reputations from defamatory attacks. In striking a balance between these competing interests, the courts have considered a number of factors, such as the status of the plaintiff (public official or public/private figure), the status of the defendant (media/nonmedia), and the subject matter of the statement (public/private issue). The standard of liability and the type of damages allowed will vary, depending on a court's determination of these

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1. 4 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 571 (1876).

2. *See generally, e.g.*, W. BUTTON, PRINCIPLES OF THE LAW OF LIBEL AND SLANDER (1935); L. ELDREDGE, THE LAW OF DEFAMATION (1978); H. FOLKARD, THE LAW OF SLANDER AND LIBEL (3d ed. 1869); H. FRASER, FRASER ON LIBEL (6th ed. 1925); C. GATLEY, GATLEY ON LIBEL AND SLANDER (1924); M. NEWELL, NEWELL ON SLANDER AND LIBEL (1890); W. ODGERS, LIBEL AND SLANDER (1881); R. SACK, LIBEL, SLANDER AND RELATED PROBLEMS (1980); Anderson, *Libel and Press Censorship*, 53 TEX. L. REV. 422 (1975); Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811; Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205 (1976); Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976); Pedrick, *Freedom of the Press and the Law of Libel: The Modern Revised Translation*, 49 CORNELL L. REV. 581 (1964).

3. L. ELDREDGE, *supra* note 2, at 2.

4. Lovell, *The "Reception" of Defamation by the Common Law*, 15 VAND. L. REV. 1051, 1052 (1962).

5. L. ELDREDGE, *supra* note 2, at 6.

6. 376 U.S. 254 (1964).

7. *Id.* at 264.

8. *See id.* at 294 (Black, J., concurring).

9. *See id.* at 278–79 (majority opinion).

factors. The most recent of these decisions came in *Dun & Bradstreet v. Greenmoss Builders, Inc.*[10]

The end result of this series of decisions is a constitutional defamation standard which, through its confusing application and misguided emphases, does not protect a person's reputational interest or the interests of the first amendment. This Note will examine the precepts of defamation law; the development of the constitutional restrictions, emphasizing the recent decision in *Greenmoss*; and some proffered solutions by scholars in the area. It will then offer a solution of its own.

II. THE COMMON LAW OF DEFAMATION

Traditionally, the main purpose of defamation law has been to publicly vindicate the plaintiff's name.[11] In very early defamation law, the only remedy available for a defamation claim was a public apology by the defendant and possibly some punitive action.[12] After the Norman Conquest, the defamation claim fell within the jurisdiction of the church courts, and the only remedy was public vindication.[13] Limited monetary damages became an available remedy only in the latter half of the sixteenth century, when the common law courts obtained jurisdiction.[14]

Monetary damages serve a second purpose of defamation law; compensating the plaintiff for the harm which has occurred.[15] A third purpose of defamation law has been one of deterrence, to punish the defendant who has acted outrageously and dissuade that defendant and others from publishing false and defamatory statements.[16]

As the common law developed, damages were more easily granted to the plaintiff as a remedy. Under the modern common law, defamation was a strict liability offense; the publisher published at his or her peril.[17] All a plaintiff needed to prove was that the defendant made a nonprivileged, defamatory statement about the plaintiff to a third person.[18] Truth was an affirmative defense that could be raised by the defendant.[19]

For certain types of defamation, such as those types of slander which did not fall into a per se category,[20] the plaintiff also needed to prove actual pecuniary harm, known as special damages.[21] Otherwise, harm was presumed, and the jury could award

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10. 472 U.S. 749 (1985).

11. L. ELDREDGE, *supra* note 2, at 4; RESTATEMENT (SECOND) OF TORTS § 623 Special Note (1977).

12. *See* Lovell, *supra* note 4, at 1052. A typical penalty was the cutting off of the publisher's tongue. *Id.*

13. *Id.* at 1055. Public vindication took the form of the publisher, wrapped in a white shroud, holding a lighted candle, and kneeling, confessing the sin in the presence of priests and the injured party. *Id.*

14. L. ELDREDGE, *supra* note 2, at 5.

15. *Id.*; RESTATEMENT (SECOND) OF TORTS § 623 Special Note (1977).

16. L. ELDREDGE, *supra* note 2, at 6; RESTATEMENT (FIRST) OF TORTS § 908 comment a (1938).

17. Rex v. Woodfall, Lofft 776, 781, 98 Eng. Rep. 914, 916 (1774); L. ELDREDGE, *supra* note 2, at 15. *See* RESTATEMENT (FIRST) OF TORTS §§ 558, 563, 564, 579, 580 (1938).

18. RESTATEMENT (FIRST) OF TORTS § 558 (1938).

19. L. ELDREDGE, *supra* note 2, at 323.

20. The four accepted per se categories are as follows: (1) Words which impute a criminal offense which is punishable by death or imprisonment or is regarded by public opinion as involving moral turpitude; RESTATEMENT (SECOND) OF TORTS § 571 (1977); (2) Words which impute to the plaintiff a venereal disease; *id.* at § 572; (3) Words which impute improper conduct in business; *id.* at § 573; and (4) Words which impute serious sexual misconduct; *id.* at § 574.

21. *See* RESTATEMENT (SECOND) OF TORTS §§ 570, 575 (1977); L. ELDREDGE, *supra* note 2, at 94.

damages without the plaintiff proving any harm.[22] In the courts' view, injury to reputation was too subtle and invidious to be subject to actual proof.[23] Harm could take several forms. Defamatory statements could result in avoidance of the plaintiff by persons whom he or she does not know, as well as affecting the plaintiff's relationships with people he or she does know, caused by the hidden doubts they may subconsciously harbor.[24] Testimonial proof does not lend itself to discovering these harms, although harms of these types can be inferred from knowledge of the general patterns of human behavior.

The common law recognized that allowing recovery for defamation would have a "chilling effect" on certain types of legitimate speech. To deal with this problem, the common law developed an elaborate set of privileges. Some statements were absolutely privileged,[25] such as those made during government proceedings and those made by a public official while acting within the scope of official duties. The purpose of a government proceeding would have been defeated if participants feared a defamation claim resulting from statements made within the hearing.

Other more narrow, special privileges were available,[26] such as the right to report on statements made in a government proceeding. These privileges were not absolute, but only applied to accurate reports, made without malice.[27] The courts had determined that the public interest in receiving these statements was important even if the publisher knew that statements made within the hearing were false.[28]

A group of specified, conditional privileges also existed.[29] For example, a property owner would be protected for accusing someone of stealing personal property. These privileges were "based upon a public policy that recognizes that it is essential that true information be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public."[30] These privileges were narrow and were not valid when abused, such as when the publication was knowingly false, when unprivileged information was included in a publication, or when information was published to persons beyond the scope of the privilege.[31]

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22. Thorley v. Lord Kerry, 4 Taun. 355, 128 Eng. Rep. 367 (1812); RESTATEMENT (FIRST) OF TORTS § 569 (1938).

23. Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 (1974) (White, J., dissenting); W. PROSSER, LAW OF TORTS 765 (4th ed. 1971).

24. *See* Anderson, *supra* note 2, at 765.

25. RESTATEMENT (SECOND) OF TORTS §§ 583-92A.

26. *Id.* at §§ 611-12.

27. *Id.*; *see also, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 458-59 (1976); American Dist. Tel. Co. v. Brink's, Inc., 380 F.2d 131, 133 (7th Cir. 1967); Lulay v. Peoria Journal-Star, Inc., 34 Ill. 2d 112, 115, 214 N.E.2d 746, 748 (1966).

28. *E.g.*, Rosenbloom v. Metromedia, 403 U.S. 29, 38 (1971); Barrows v. Bell, 73 Mass. (7 Gray) 301, 313 (1856); *see also* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (inaccurate report held not to be privileged).

29. RESTATEMENT (SECOND) OF TORTS §§ 593-98A (1977).

30. *Id.* at 593 (scope note preceding) (1977).

31. *Id.* at §§ 599, 600, 602-605A.

III. THE CONSTITUTIONAL DEVELOPMENT

A. New York Times v. Sullivan: *The Constitutional Beginning*

Prior to *New York Times v. Sullivan*,[32] defamatory statements had been found to be completely outside of first amendment protection.[33] The Court in *New York Times* held that the first amendment limited the state's power to formulate its own defamation law.[34] The *New York Times* case concerned an advertisement which set forth certain facts about a series of civil rights demonstrations in Alabama.[35] A city commissioner from Montgomery, Alabama brought a libel claim in the Alabama courts alleging that certain facts in the advertisement were false and defamatory to the plaintiff and his police force.[36] The jury found for the plaintiff and awarded $500,000 in damages.[37] The Alabama appellate courts sustained the verdict and the damage award.[38] The United States Supreme Court then heard the case and constitutional defamation law was born.

The *New York Times* case raised many of the first amendment concerns present in the defamation area. The case presented to the Court a situation in which libel law was being used to punish unpopular views and to attempt to "chill" speech in the area.[39] Hostility to northern media coming to the south and "stirring up trouble" was common during the time of the civil rights protests.[40]

The Court held that, when a public official brings a defamation action, the plaintiff must show that the defendant acted with actual malice.[41] It defined actual malice as knowledge of falsity or reckless disregard for the truth.[42] The Court reasoned that while false facts have no first amendment value per se, the first amendment requires that the press have some "breathing space" while determining truth or falsity of a statement.[43] If the press could be held liable for an accidental

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32. 376 U.S. 254 (1964).

33. *See, e.g.*, Roth v. United States, 354 U.S. 476, 482–83 (1957) ("Libelous utterances are not within the area of constitutionally protected speech."); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (libelous speech among the "limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem"); Near v. Minnesota, 283 U.S. 697, 714 (1931) ("Common law rules that subject the libeler to responsibility for the public offense, . . . are not abolished by the protection extended in our constitutions.").

34. 376 U.S. 254 (1964).

35. *Id.* at 257–58. The advertisement contained the headline "Heed Their Rising Voices." It sought support for the civil rights movement and Martin Luther King, Jr. in particular. *Id.* The advertisement, accusing no one by name, stated that "Southern violaters" had arrested Dr. King seven times, had persecuted black students for singing "My Country 'Tis of Thee" on the steps of the Alabama State Capitol, and had locked them out of their dining hall "'in an attempt to starve them into submission.'" *Id.* The advertisement contained the names of twenty well-known people, who were listed as supporters of their movement, and the names of a number of black clergymen. *Id.*

36. *Id.* at 258–59. Sullivan was a councilman in Montgomery who was in charge of the police department. *Id.* He alleged that certain statements made in the advertisement were untrue and defamatory. *Id.* The "false and defamatory facts" were: (1) that Dr. King had been arrested seven times (actually only four); (2) that the song was "My Country 'Tis of Thee" (actually it was "The Star-Spangled Banner"); and (3) that the students were not locked out of the dining hall. *Id.*

37. *Id.* at 254.

38. *Id.* at 263.

39. *Id.* at 294 (Black, J., concurring).

40. *Id.*

41. *Id.* at 279–80 (majority opinion).

42. *Id.* at 280.

43. *See id.* at 271–72.

mistake of fact, the Court argued, it would be reluctant to pursue investigation into any controversial area for fear that a mistake in fact could bring on a lawsuit.[44] The Court found that such self-censorship is not consistent with the policies behind the freedom of the press.[45]

In the Court's opinion, "breathing space" is particularly necessary when the alleged defamatory statement concerns a public official.[46] To be able to criticize government officials freely, without fear of prosecution, is a basic precept of the first amendment and self-government in general.[47] To make the press liable for accidental, even negligent, mistakes in its criticism of public officials, the Court reasoned, is analogous to the common law crime of seditious libel.[48]

The Court also determined that, because public officials are immune from suit upon any defamatory comments they might make in the scope of their duties, it would not be equitable to allow them to bring such suits, at least not for accidental mistakes.[49] Under this standard, legitimate speech presumably would not be chilled since only speech known to be false or speech whose truth or falsity is determined recklessly would be actionable.

B. *Extension of the* New York Times *Framework*

In 1967, the Court heard the next important constitutional defamation case, *Curtis Publishing Co. v. Butts*.[50] In this case the Court extended the *New York Times* protection of the press to "public figures" as well as public officials.[51] Although public figures do not have the immunity that public officials have, many of the first amendment policies apply equally as well. The Court held that some people are influential and deserving of unimpeded public comment, though they are not currently elected to any public office.[52]

In the next important case, *Rosenbloom v. Metromedia, Inc.*,[53] a person, arrested for selling allegedly obscene materials, brought suit against a local radio station for failing to mention that the materials confiscated by the police were only allegedly obscene.[54] The plurality opinion of three justices, written by Justice Brennan, held that a plaintiff must show actual malice if the communication concerned "matters of public or general concern."[55] Under the *Rosenbloom* test, the status of the plaintiff was irrelevant; it was the public or private nature of the speech that determined whether the heightened *New York Times* liability requirements would apply. The plurality concluded that the first amendment was meant to protect speech

44. *Id.* at 279.
45. *Id.*
46. *See id.* at 270–79.
47. *Id.*
48. *Id.* at 273.
49. *Id.* at 282.
50. 388 U.S. 130 (1967).
51. *Id.* at 163–65 (Warren, C.J., concurring) (controlling opinion).
52. *Id.*
53. 403 U.S. 29 (1971).
54. *Id.* at 32–34 (plurality opinion).
55. *Id.* at 43–44.

concerning public matters, so those first amendment interests prohibited the "chilling effect" of a defamation claim unless actual malice could be shown.[56]

Even though only three of the justices had supported the test, several lower courts used the *Rosenbloom* public/private issue distinction of the plurality.[57]

C. Gertz v. Robert Welch, Inc.

Justice Powell, writing for the majority in *Gertz v. Robert Welch, Inc.*,[58] rejected the *Rosenbloom* plurality's public/private issue distinction and allowed the state to determine its own standard of liability for defamation with certain limitations. The Court held that the proper purpose of establishing a constitutional libel standard was to balance the problem of media self-censorship with the societal value of protecting the reputation of persons from defamatory falsehoods.[59] The majority found the test proposed by the *Rosenbloom* plurality too difficult to apply, and dealt only with the problem of self-censorship without considering the state's interest in preventing defamatory falsehoods.[60]

The Court concluded that when private individuals are plaintiffs, the state's interest in protecting reputation outweighs the first amendment interest in preventing self-censorship.[61] Certain characteristics of public figures not present with private individuals shift the balance to require heightened press protection when a public figure is the plaintiff.[62] Public figures generally have far greater access to the media than private individuals and are thus able to use self-help to combat the reputational damages caused by the defamatory attack.[63] The Court realized that although self-help is not enough in itself to undo the harm caused by the defamatory falsehood, it is still a factor to be weighed in assessing the overall damage to the individual.[64] A public figure, by thrusting him or herself into the forefront of public controversies, has assumed the risk of possible defamation.[65] Defamatory attacks, Justice Powell's opinion stated, are part of the price one pays for living in the public eye.[66]

While the Court held that the first amendment does not require a private figure to establish actual malice, it nonetheless placed some restrictions on the state's power to establish its own defamation law. When the plaintiff is a private figure, the Court

56. *Id.* at 40–44.

57. *E.g.*, Firestone v. Time, Inc., 460 F.2d 712, 717 (5th Cir. 1972), *cert. denied*, 409 U.S. 875 (1972); Treutler v. Meredith Corp., 455 F.2d 255, 259 (8th Cir. 1972); Gospel Spreading Church v. Johnson Publishing Co., 454 F.2d 1050, 1051 (D.C. Cir. 1971); Cerrito v. Time, Inc., 449 F.2d 306, 307 (9th Cir. 1971).

58. 418 U.S. 323 (1974).

59. *Id.* at 343.

60. *Id.* at 339–46.

61. *Id.* at 344–46.

62. *Id.*

63. *Id. But see* Time, Inc. v. Firestone, 424 U.S. 448, 489 (1976) (Marshall, J., dissenting) (plaintiff not a public figure despite several press conferences she had held during her divorce trial).

64. Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 n.9 (1974).

65. *Id.* at 344–45.

66. *Id.*

held, the state cannot follow the traditional common law rule of strict liability.[67] A finding of at least negligence is required under the first amendment.[68]

The majority opinion also forbade the imposition of presumed and punitive damages unless a showing of actual malice is made.[69] The Court found that because the state's interest in protecting the individual from defamatory falsehoods is competing with a first amendment interest, the remedies the state can employ can reach no further than is necessary to protect that legitimate state interest.[70] If presumed damages are allowed, the jury would have too much discretion to award damages beyond the actual harm suffered.[71] The Court, therefore, limited damages to "actual harm."[72] "Actual harm" is not limited to common law "special damages," but includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering" as long as competent evidence has been presented showing that these types of harm actually have occurred.[73]

Justice Powell's opinion also reasoned that "punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for defamation actions."[74] Without a showing of actual malice, punitive damages merely enhance the problem of media self-censorship without any evidence of truly reprehensible conduct.[75]

Justice White wrote a protracted dissent strongly criticizing the Court for abandoning the long history of the common law standard for liability.[76] In White's opinion the Court had no basis to overturn suddenly a standard of strict liability that all fifty states had adopted, and that the Court had accepted for nearly two hundred years.[77] He also condemned the abandonment of presumed and punitive damages in those instances in which actual malice had not been proven, because the Court had ignored the common law rationales for these doctrines.[78] The common law allowed presumed and punitive damages because damages are too difficult to prove when one's reputation has been unfairly besmirched.[79] Classically, punitive damages were allowed only when "common law malice," ill will, had been shown. They were indeed punishing reprehensible conduct, and therefore, Justice White contended, there was no reason to require the additional showing of "actual malice."[80]

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67. *Id.* at 347.
68. *Id.*
69. *Id.* at 349–50.
70. *Id.* at 349.
71. *Id.*
72. *Id.*
73. *Id.* at 350.
74. *Id.*
75. *Id.*
76. *Id.* at 369–404 (White, J., dissenting).
77. *Id.* at 370.
78. *Id.*
79. *Id.* at 394; *see supra* text accompanying notes 21–25.
80. Gertz v. Robert Welch, Inc., 418 U.S. 323, 396–97 (1974) (White, J., dissenting).

D. Dun & Bradstreet v. Greenmoss Builders, Inc.

A major question that courts addressed after *Gertz* is whether the restrictions laid down in *Gertz* would apply when the defendant was not the media, but a private individual.[81]

Dun & Bradstreet v. Greenmoss Builders, Inc.[82] presented the Court with a perfect opportunity to decide whether the *Gertz* limitations would apply when the media was not a party. In 1976, the defendant, a private credit reporting agency, distributed to five of its customers a credit report stating that Greenmoss Builders, Inc. had filed for bankruptcy.[83] Actually, a seventeen-year-old high school employee of Dun & Bradstreet mistakenly had attributed a bankruptcy filing by a former employee of Greenmoss to Greenmoss itself.[84] Greenmoss had not filed for bankruptcy at all.[85] Although it was the defendant's routine practice to check the accuracy of its reports with the subject of the report, it never verified the bankruptcy report with the plaintiff.[86] When the plaintiff's president, John Flanagan, became aware of the error, he notified defendant and a correction notice was issued.[87] Flanagan was not satisfied with the correction, and repeatedly sought the names of the subscribers that had received the false credit report.[88] When Dun & Bradstreet refused to disclose its subscribers, plaintiff brought suit.[89]

At the trial, the judge instructed the jury that the plaintiff did not need to prove actual damages, for damages and loss were conclusively presumed since the defamation was libelous per se.[90] The instruction also states that punitive damages could only be found if the plaintiff could prove "actual malice," but no definition for "actual malice" was given.[91] The jury delivered a verdict for the plaintiff awarding $50,000 in compensatory damages and $300,000 in punitive damages.[92] The trial court granted a motion for a new trial on the ground that the jury instructions permitted the jurors to award presumed and punitive damages in violation of *Gertz*.[93]

The Vermont Supreme Court held that the trial court should not have granted a new trial.[94] The Vermont court found no error in the jury instruction.[95] Drawing support from the Oregon Supreme Court case, *Harley-Davidson Motorsports, Inc. v.*

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81. *See, e.g.*, Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359 (Or. 1977); Calero v. Del Chem. Corp., 68 Wis. 2d 487, 228 N.W.2d 737 (1975).

82. 472 U.S. 749 (1985).

83. Dun & Bradstreet v. Greenmoss Builders, Inc., 143 Vt. 66, 70–71, 461 A.2d 414, 416 (1983), *aff'd on other grounds*, 472 U.S. 749 (1985).

84. *Id.* at 71, 461 A.2d at 416.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 70–72, 461 A.2d at 416.

89. *Id.* at 69, 461 A.2d at 415.

90. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 754 (1985).

91. *Id.*

92. Dun & Bradstreet v. Greenmoss Builders, Inc., 143 Vt. 66, 69, 461 A.2d 414, 415 (1983), *aff'd on other grounds*, 472 U.S. 749 (1985).

93. *Id.* at 69–70, 461 A.2d at 415.

94. *Id.* at 79, 461 A.2d at 421.

95. *Id.*

Markley,[96] the court found that the first amendment policies leading the United States Supreme Court to require limitations on the state's determination of its defamation law are not present when the defendant is not a member of the media.[97] The Oregon court had held, "There is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press,"[98] when the defendant is not a member of the media.

The Vermont court realized the difficulty in drawing a clear line between what is and what is not the media. But, in this instance, it found the defendant to be clearly not part of the media.[99] The court found "a clear distinction between a publication which disseminates news for public consumption and one which provides specialized information to a selective, finite audience."[100]

The United States Supreme Court unanimously rejected the Vermont Supreme Court's distinction based upon the media/nonmedia status of the defendant.[101] The Court held that the press deserves no more protection than a private individual in defamation actions.[102]

The plurality opinion, written by Justice Powell, the author of *Gertz*, affirmed the holding of the Vermont Supreme Court that the requirement that the plaintiff show actual malice before the state could allow presumed or punitive damages did not apply in this case.[103] The restrictions did not apply, not because Dun & Bradstreet was not a member of the media, but because the issue concerned was a purely private one.[104] Justice Powell resurrected the *Rosenbloom* public/private issue distinction that he had rejected in *Gertz* as unworkable. However, in this case, the distinction would not be a basis for establishing liability, but would be the basis for determining whether to apply the standards which *Gertz* required a state to use when a private figure was the plaintiff.[105]

Justice Powell once again applied the balancing test that he had used in *Gertz*.[106] By weighing the first amendment interest with the state's interest in compensating private individuals for injury to their reputations, he found that when the issue is not one of public concern, the first amendment interests at stake in *Gertz* are not as strong.[107]

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96. 279 Or. 361, 568 P.2d 1359 (1977).

97. Dun & Bradstreet v. Greenmoss Builders, Inc., 143 Vt. 66, 75, 461 A.2d 414, 418 (1983), *aff'd on other grounds*, 472 U.S. 749 (1985).

98. Harley-Davidson Motorsports, Inc., v. Markley, 279 Or. 361, 370–71, 568 P.2d 1359, 1365 (1977).

99. Dun & Bradstreet v. Greenmoss Builders, Inc., 143 Vt. 66, 73, 461 A.2d 414, 417 (1983), *aff'd on other grounds*, 472 U.S. 749 (1985).

100. *Id.*

101. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 756, 764, 773.

102. *Id.*

103. *Id.* at 763.

104. *Id.* at 762.

105. *Id.* at 757–61.

106. *Id.*

107. *Id.*

Justice Powell argued that the Court traditionally has recognized that not all speech receives equal protection from the first amendment.[108] Speech concerning "matters of public concern" is "at the heart of the first amendment's protection,"[109] claimed Justice Powell. While the state's interests in awarding presumed and punitive damages are not "substantial" compared to the first amendment interests in *Gertz*, they become "substantial" compared to the speech with less first amendment value present in the *Greenmoss* case.[110] Justice Powell emphasized the common law reasons for establishing presumed damages that Justice White had pointed out in his dissent in *Gertz*.[111]

Justice Powell went on to decide that the credit report was a matter of purely private concern.[112] The speech was "solely in the interest of the speaker and its specific business audience."[113] Weight was also given to the fact that the report was distributed to only five people, and thus lacked any "strong interest in the free flow of commercial information."[114]

Justice White concurred in the judgment of the Court. Reiterating his disagreement with the *Gertz* opinion, he called for its reversal.[115] There was no valid reason to discard the common law rules of defamation, Justice White again reasoned.[116] However, this time he went further, calling for the reexamination of *New York Times* itself.[117] He looked at the values that the *New York Times* Court was trying to promote.[118] The Court was trying to prevent self-censorship on issues of public importance.[119] Since large jury verdicts, particularly large punitive damage judgments, are what deter the media from pursuing controversial subjects, Justice White contended that the size of the verdict should be the target of constitutional limitations.[120]

Justice White emphasized that the purpose of common law defamation actions was as much to clear one's name as to receive monetary compensation.[121] False speech has no positive constitutional value, wrote White, and, to the contrary, erroneous information frustrates uninhibited, robust, and "wide-open debate" on public issues.[122] Under the *New York Times* holding, White contended, a public official who is the subject of a defamatory falsehood, but cannot prove actual malice,

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108. *Id.* at 758 n.5. Justice Powell pointed out that obscene speech and fighting words have received no first amendment protection, *id.* (citing Roth v. United States, 354 U.S. 476, 483 (1957), and Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942)), and that commercial speech occupies a "subordinate position in the scale of First Amendment values." *Id.* (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

109. *Id.* (quoting Thornhill v. Alabama, 310 U.S. 88, 101 (1940)).

110. *Id.*

111. *Id.* at 757 n.4. *See supra* text accompanying notes 78–79.

112. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 762 (1985).

113. *Id.*

114. *Id.* at 763.

115. *Id.* at 767 (White, J., concurring).

116. *Id.* at 772.

117. *Id.* at 767.

118. *Id.*

119. *Id.* at 770.

120. *Id.* at 774.

121. *Id.* at 771.

122. *Id.* at 767.

is unable to vindicate his or her reputation, and a false fact is allowed to remain unexposed to the public.[123] Justice White argued that if the Court would abandon the heightened burden on the plaintiff and simply limit the amount of the damages, the public official could vindicate his or her name, a false fact would be exposed, and there would be no unreasonable verdict that might lead to self-censorship by the press.[124]

The dissenting opinion, authored by Justice Brennan and supported by Justices Marshall, Blackmun, and Stevens, disagreed with Justice Powell's interpretation of the *Gertz* case.[125] The dissent pointed out that in *Gertz*, Justice Powell had not found that the interest the state had in presumed and punitive damages was outweighed by first amendment concerns, but that presumed damages were overbroad and the damages were, in Justice Powell's words, "wholly irrelevant" to the state's interest.[126] The dissent would have applied *Gertz* to all defamation cases.[127]

E. *The Current Framework*

It is not clear how much *Greenmoss* will change the framework that the courts currently apply. The plurality in *Greenmoss* rejected the media/nonmedia status of the defendant as a basis for deciding the proper level of liability, but the criteria the plurality used to determine whether an issue is a private or public one seem to lead to the same result. Justice Powell discussed the level of public interest and the scope of dissemination as factors in determining whether the issue is public or private. Upon closer examination, it becomes clear that these are also the factors which would determine whether the communicator is part of the media. If the issue was not of any interest to the public, it would not be of interest to the media.[128] If the scope of the communication was small, the communicator was probably not a member of the media. While the Court has avoided having liability rest on whether the label "media" has been stamped on the defendant, the rationale that lower courts have used in determining whether the defendant is a member of the media need not change when those courts apply the Court's public/private concern test.

The major question that the Court left open in *Greenmoss* was whether a plaintiff need even prove negligence on the part of the defendant where the issue is a private one.[129] The Court only addressed the question of whether the restrictions on punitive

123. *Id.* at 769–71.

124. *Id.*

125. *Id.* at 775 (Brennan, J., dissenting).

126. *Id.* at 779 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1973)).

127. *Id.* at 779–80.

128. A media publisher, acting in its own self-interest, will publish only the information in which it feels the public is interested. While it can be argued that there is a difference between facts that the public "is concerned with" and those facts which are in the "public concern," it would be extremely troublesome for the courts to second guess publishers as to what facts were actually in the "public concern."

129. The plurality opinion did not address the question of whether the negligence requirement established in *Gertz* would apply when a private issue was concerned, probably the *Greenmoss* defendant clearly had been negligent. Justice White read the plurality opinion to mean that negligence would not have to be shown when a private issue was concerned. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 770 (1985) (White, J., concurring). The dissenters interpreted the plurality opinion differently, and argue that a plaintiff still must prove negligence to sustain a defamation claim. *Id.* at 775–76 (Brennan, J., dissenting).

and presumed damages found in the *Gertz* opinion applied in the case of a private issue, and did not discuss the question of the standard of liability required for judgment. Although the plurality opinion did not address the question, the language in the *Greenmoss* opinion seems to indicate that *Gertz* does not apply at all where a purely private issue is concerned.[130] The question of where the balance would fall between the state's interest in prescribing strict liability in defamation cases and the interests of the first amendment is left unanswered.

While the *Greenmoss* decision revives the common law of defamation where the issue is of no public concern, at least on the issue of damages, the framework for constitutional libel established in *New York Times* remains substantially the same. Currently, if the plaintiff is a public figure, he or she must show actual malice, defined as knowledge of falsity or acting with reckless disregard for the truth, to sustain a judgment in his or her favor.[131] If the plaintiff is a private figure, he or she need not show actual malice to win on the liability issue.[132] When the issue is a public matter, the plaintiff must at least show negligence and is precluded from presumed and punitive damages unless he or she can also show actual malice.[133] When the issue is a private matter, the plaintiff need not show actual malice to obtain presumed and punitive damages, and it is not clear whether he or she need even show negligence to establish liability and receive the presumed damages.[134] It is this basic framework which forms the basis for the problems that exist with the constitutional restrictions on state defamation law.

IV. A New Constitutional Framework

A. *The Problems with the Present Framework*

The goal of a constitutional policy should be to balance the interests of the first amendment with those of the state in protecting its citizens from defamatory falsehoods.[135] The means chosen should provide for redress of the injuries incurred by the plaintiff and punishment of the publisher who acts outrageously without deterring the publisher from printing legitimate statements. The current constitutional means do not adequately accomplish any of these objectives. While juries are willing to award verdicts to injured plaintiffs, appellate courts nearly always overturned these verdicts.[136] Those verdicts that do survive are usually extremely large and may be so devastating to a publisher, especially a small one, that it would be forced to avoid

130. *See supra* text accompanying notes 106–10.

131. *See supra* text accompanying notes 32–57.

132. *See supra* text accompanying notes 58–80.

133. *Id.*

134. *See supra* note 129.

135. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

136. A 1981 study revealed that juries find against media defendants 85% of the time. Trial courts strike down 20% of these verdicts, and appellate courts reverse 66% of the remaining verdicts. On the whole, the plaintiff has only a 7% chance of success. Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 Am. B. Found. Res. J. 795, 803 (1981); Franklin, *A Critique of Libel Law*, 18 U.S.F.L. Rev. 1, 5, n.23 (1983) [hereinafter cited as *A Critique*].

reporting on controversial areas,[137] or even forced to cease publication.[138] Many commentators and some of the justices have attacked the *New York Times* framework as being too complex to apply fairly and as being inadequate to protect either plaintiffs or defendants.[139]

B. *Should the Defamation Claim Be Abolished?*

One suggested solution, expressed frequently by Justices Black and Douglas,[140] is to eliminate defamation as a cause of action altogether. They argued that the defamation claim is inherently inconsistent with the first amendment.[141] While this standard would certainly eliminate the confusion that currently exists, it would neither protect individuals nor actually promote first amendment policies.

The interest a state has in protecting the individual from unfair attacks should not be dismissed. The individual's right to the protection of his or her own good name "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."[142] The effects of a defamatory attack can be devastating upon a person's economic and personal life.[143]

Eliminating defamation as a cause of action would also not further the interests of the first amendment.[144] While the negative first amendment interest, prevention of the "chilling effect" would certainly be satisfied, the positive interests of the first amendment would be controverted. Even one of the original advocates of our modern conception of free speech, John Stuart Mill, recognized the fundamental difference

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137. Anderson, *supra* note 2, at 422; Franklin, *A Critique*, *supra* note 136, at 16–18; Hunter, *A Reprise on* Herbert v. Lando *and the Law of Defamation*, 71 KY. L.J. 569, 591 (1982–83); Smolla, *Let the Author Beware: The Rejuvenation of the American Law of Libel*, 132 U. PA. L. REV. 1, 12 (1983); Note, *The Constitutionality of Punitive Damages in Libel Actions*, 45 FORD. L. REV. 1382, 1424 (1977); *The Little Guy in the Big Suit*, COLUM. J. REV., Jan.-Feb. 1983, at 42; Kupferberg, *Libel Fever*, COLUM. J. REV., Sept.-Oct. 1981, at 36, 39; Friendly, *Investigative Journalism is Changing Some of Its Goals and Softening Tone*, N.Y. Times, Aug. 23, 1983, at 8, col. 1. *Contra* Smith, *The Rising Tide of Libel Litigation: Implications of the* Gertz *Negligence Rules*, 44 MONT. L. REV. 71, 87 (1983) (counsel for the *Washington Post* indicating that libel litigation had not changed the paper's policies).

138. One particularly dramatic example of this danger can be seen in the libel litigation against the *Alton Telegraph*, when a daily paper from Alton, Illinois with a circulation of 38,000 was subject to a $9.2 million judgment. Green v. Alton Telegraph Co., 77-66 (Madison County, Ill. 1980). The newspaper was forced to file for bankruptcy, but a settlement was eventually reached that allowed it to stay in business. [News Notes], Media L. Rep. (BNA) (June 8, 1982). For an interesting discussion of how the suit has affected the paper, see Wall St. J. Sept. 29, 1983, at 1, col. 6.

139. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 763–67 (1985) (Burger, C.J. & White, J. concurring); Franklin, *A Critique*, *supra* note 136, at 29–34; Smolla, *supra* note 137, at 48, 63–64.

140. Gertz v. Robert Welch, Inc., 418 U.S. 323, 356 (1974) (Douglas, J., dissenting); Rosenbloom v. Metromedia, 403 U.S. 29, 57 (1971) (Black, J., concurring); New York Times v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring).

141. *See infra* note 143.

142. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

143. *See* L. ELDREDGE, *supra* note 2, at 11 ("One who believes that he appears to be ridiculous in the eyes of his fellow men can suffer an agony of emotional distress which may be more painful, and far more lasting, than the pain from the severed nerves of a torn-off arm.").

144. Justice Stewart also identified other general public values that would be harmed if the defamation cause of action was eliminated:

> The preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950s taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

between false ideas and false facts.[145] "False" ideas have positive value in that they reaffirm the strength of a true idea.[146] The weeding out of "false" ideas should be a function of the marketplace of ideas.[147] On the other hand, accurate factual information is a requirement if the marketplace of ideas is to function correctly. As in the economic free market, one of the necessary assumptions in free market theory is perfect information flow to the consumer.[148] False facts cannot be dealt with in the marketplace, and, to the contrary, impair people's ability to make a knowledgeable decision.

By providing no cause of action for the publication of false and defamatory statements, the market place of ideas is harmed in three ways. First, there would be no means of correcting any falsehood put into the market. Although the injured party can use more speech to combat the false fact, the common law of defamation is predicated on the fact that self-help through more speech is not sufficient to expose false facts.[149] One function of the defamation action is to inform the public that a statement made was false.

Second, publishers will have much less incentive to determine the truthfulness of what they print. The scrupulous publisher may, for economic reasons, spend less time insuring the truthfulness of each statement.[150] While maintaining a good reputation for accuracy still provides a strong incentive to insure the accuracy of each statement printed, on the whole that incentive would still be reduced.[151] The unscrupulous publisher, for whom reputation for accuracy does not matter, would be set free to libel at will.

Third, the public will have less faith in the press in general, even the members of the press who print the truth, because the public knows that no legal action can be taken against a publisher who prints known lies.[152]

C. *Proposals for Reform*

Many commentators have put forth proposals for a more effective defamation law.

1. *Regulating the Type of Damages*

One type of reform centers around the kind of harm which would need to be proved, and the form of damages which serve to compensate for that harm. Professor Anderson has proposed that presumed damages be totally abolished and that the

145. Mill, *Law of Libel and Liberty of the Press*, in JOHN STUART MILL ON POLITICS AND SOCIETY 143–60 (G. Williams ed. 1976).

146. Dennis v. United States, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting); J. MILL, ON LIBERTY 17–19 (R. McCallum ed. 1859).

147. *Id.*

148. T. SCITOVSKY, WELFARE AND COMPETITION 345 (1951).

149. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 46 (1971).

150. For a discussion on how the threat of damages stemming from a libel suit affects the economic behavior of a publisher, see R. POSNER, AN ECONOMIC ANALYSIS OF LAW 544 (1977).

151. Franklin, *A Critique, supra* note 136, at 27–28.

152. Hunsaker, *Freedom and Responsibility in First Amendment Theory: Defamation, Law, and Media Credibility*, 65 Q.J. OF SPEECH 25 (1979).

"actual injury" harm of *Gertz* be further restricted.[153] Presumed damages, according to Anderson, give no guidance at all to the jury as to how to compensate the plaintiff.[154] The jury is likely to use impermissible factors, such as the defendant's wealth or unpopularity, in determining the damage award.[155] The judge also has no real grounds to reduce a jury's verdict. Only a "flagrantly outrageous and extravagant" award can be reduced.[156]

Anderson contends that *Gertz*'s requirement of proof of "actual injury" is too broad.[157] The purpose of the defamation claim, argues Anderson, is to redress reputational harm.[158] Courts, nonetheless, have allowed damages for non-reputational injuries, such as emotional distress, in defamation suits.[159] Allowing compensation for this type of harm, he argues, has resulted in gratuitous awards to plaintiffs who have suffered no reputational damage whatsoever.[160] Anderson would allow damages for emotional harm only where some reputational harm had been proved.[161]

Anderson claims that by restricting compensatory damages to those actually proved, and by subordinating non-reputational harm, more accurate determinations of harm will be made, the judge will have more control over the size of the verdict, and both parties will be able to accurately judge the value of their claims which facilitates settlement.[162]

A closer look at Anderson's proposals raises questions about their effectiveness and fairness to plaintiffs. Eliminating non-reputational harm as a primary harm in the defamation claim is not an effective means of reducing damage awards. Emotional harm is an injury, and if removed from the defamation claim, a related cause of action based primarily on emotional harm, such as false-light privacy,[163] will be added to the complaint.[164] This related tort raises the same first amendment concerns as the defamation tort, and is treated in the same *New York Times* framework.[165]

The common law developed the concept of presumed damages to deal with the unique nature of reputational harm.[166] Anderson's notion that reputational harm is easily subject to testimonial proof seems questionable. He presents the unlikely scenario that a plaintiff's associates would testify that the seeds of doubt had been implanted in their minds, even though they did not believe the defamatory

153. Anderson, *supra* note 2, at 756.
154. *Id.* at 749.
155. *Id.* at 750.
156. *Id.* at 752 (quoting Chancellor Kent in Coleman v. Southwick, 9 Johns. 44, 52 (N.Y. 1812)).
157. *Id.* at 756.
158. *Id.* at 758.
159. *See* Time Inc. v. Firestone, 424 U.S. 448, 460 (1976).
160. Anderson, *supra* note 2, at 757–58; *see* Ashdown, Gertz *and* Firestone: *A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 670–71 (1977).
161. Anderson, *supra* note 2, at 757–58 (treating emotional distress as parasitic as in other tort actions).
162. *Id.* at 775–76.
163. *See* RESTATEMENT (SECOND) OF TORTS § 652A(2)(d).
164. *See* Van Alstyne, *First Amendment Limitations on Recovery From the Press - An Extended Comment on "The Anderson Solution,"* 25 WM. & MARY L. REV. 793, 809–11 (1984).
165. *See* Time, Inc. v. Hill, 385 U.S. 374 (1967).
166. *See supra* text accompanying notes 21–24.

statements.[167] The common law recognized that such harm is very subtle, possibly residing in a person's subconscious, and therefore proof of that harm was not available through customary means.[168]

2. *Splitting the Cause of Action*

Other commentators have proposed a new cause of action emphasizing the vindicatory function of a defamation claim.[169] Professor Franklin has proposed that there be two separate remedies for a defamatory attack.[170] A damage action could be brought where the plaintiff, whether a public or private figure, would need to show actual malice before recovering any damages.[171] The plaintiff would also have the option of bringing a "restoration" action, which allows awarding of a declaratory judgment of falsehood and recovery of reasonable attorney's fees.[172]

Professor Ingber has proposed three separate remedies.[173] The first is a strict liability action where the only remedy is a declaratory judgment and damages for actual pecuniary loss.[174] The second is a negligence standard claim, where upon a showing that the defendant acted negligently, the plaintiff could obtain the same remedies available in the strict liability action, plus reasonable attorney's fees.[175] The third action would require a showing of actual malice, and damages for actual injury could be recovered.[176]

There are two main problems with these types of proposals. First, the damage action will remain a complicated and expensive ordeal because actual malice would need to be proved. Second, to avoid the legal expense of bringing a damage action, the plaintiff must choose a remedy which, while performing the vindicatory function, leaves the plaintiff uncompensated for a major portion of the injury.

3. *Mitigation of Harm*

Another commentator has proposed a solution based on mitigation principles. Professor LeBel has proposed a "right of repair" which would allow the defendant to eliminate all presumed damages by devoting the same amount of resources used to publish the defamation to counter the false statements.[177] Damages would still be available for actual injury which has been proved.[178]

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167. Anderson, *supra* note 2, at 767.

168. *See supra* text accompanying notes 21–24.

169. *See* Franklin, *A Critique, supra* note 136, at 35–49; Ingber, *A Conflict Between Reason and Decency*, 65 VA. L. REV. 785, 852–57 (1979).

170. Franklin, *A Critique, supra* note 136, at 36.

171. *Id.*

172. *Id.*

173. Ingber, *supra* note 169, at 852–57.

174. *Id.* at 852–55.

175. *Id.* at 855–56.

176. *Id.* at 856–57.

177. LeBel, *Defamation and the First Amendment: The End of the Affair*, 25 WM. & MARY L. REV. 779, 788–89 (1984).

178. *Id.* at 789 n.42.

While this proposal recognizes that a retraction can mitigate damages, the mitigation value of the right of repair appears arbitrary. On one side, there is no correlation between the presumed harm and the amount spent to publish the defamatory statement. A short, careless falsehood can cause much more damage than a long, complicated, and more expensive falsehood. The first falsehood could go undercompensated, while the second falsehood could be overcompensated. On the other side, the mitigatory value of a retraction is underutilized if it only goes to mitigate presumed damages. A significant retraction could reduce the proven harm as well.

D. *A Proposal for a New Framework*

This Note proposes a new framework for achieving an effective balance between the first amendment and the state's interest in its defamation law. The proposal calls for a return to the common law strict liability standard with the burden of proving falsity by clear and convincing evidence on the plaintiff, and with restrictions placed on the damage portion of the verdict. Recognizing the strong rationale behind the common law doctrine of presumed damages, this proposal would not restrict damage awards by eliminating the presumption of harm. Instead, mitigation principles would be used to reduce jury awards. Two damage awards would be given by the jury. One damage award would assess the dollar amount of the injury suffered by the plaintiff, the normal damage verdict, and a second verdict would state what the dollar value of the injury to the plaintiff would be after being mitigated by a significant retraction by the defendant. The defendant would then have the choice of paying out the whole dollar value of the injury, or making the significant retraction and paying the surplus damage. Finally, judges, both appellate and trial, must take a more active role in reducing unreasonable jury verdicts.

The strict liability standard addresses the interests of the injured plaintiff much better than the current standard.[179] The vindicatory aspect of the defamation suit would regain its proper position.[180] A plaintiff would still retain a heavy burden of proving falsity, but once falsity is proved, a verdict should be rendered in favor of the plaintiff, achieving at least part of the plaintiff's goals in bringing the suit.

The strict liability standard also furthers first amendment interests. The issue of liability is not what causes the "chilling effect" upon a publisher.[181] Publishers probably will not avoid controversial issues, solely on the possibility that they would be forced to admit their mistake if a statement was proven false. The common law rules of privilege would also work to prevent any self-censorship.[182]

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179. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 765 (1985) (White, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323, 370–80 (1974).

180. *See, e.g.*, Franklin, *A Critique*, *supra* note 136, at 40–46 (discussing the importance of vindication in his proposal for a new claim of "restoration"); Hulme, *Vindicating Reputation: An Alternative to Damages as a Remedy for Defamation*, 30 AM. U.L. REV. 375, 391–414 (1981) (proposing pure vindication as a remedy); Note, *An Alternative to the General-Damage Award for Defamation*, 20 STAN. L. REV. 504, 505 (1968) (proposing a retraction statute).

181. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1974).

182. *See supra* text accompanying notes 25–31.

With strict liability, false facts would be exposed to the public after they were proved false. Under the current system, when the issue is a public one and the interest of the public in exposing false facts is at its highest, a false fact will remain unexposed unless the plaintiff shows not only that the fact was false, but that the publisher acted either negligently or recklessly, depending on whether the plaintiff was a public or private figure.[183] These latter concerns are irrelevant to whether the public should be allowed to perceive the false fact as true. Thus, many false facts are allowed to remain unexposed simply because the plaintiff could not prove that the defendant acted with the requisite mental element.[184]

Strict liability will also drastically reduce the time and cost of defamation litigation, items which lead directly to a "chilling effect."[185] The only factual issues at the trial would be the falsity of the statement and the damage suffered by the plaintiff.[186] The extensive discovery process into the method of editorial operation of the defendant would no longer be necessary.[187]

The cause of the "chilling effect" that the *New York Times* Court was trying to prevent is a result, not of the issue of liability, but of the damage award.[188] It is the spectre of a large dollar payoff which deters a publisher from pursuing a controversial story.[189] A damage award must try to fairly compensate the victim without chilling legitimate speech.

Under this Note's proposal, a jury would determine the dollar value of the harm suffered by the plaintiff as in any civil suit, but then the publisher would be given a further chance to mitigate the harm by publishing a significant retraction. The judge could give the jury instructions on what a significant retraction would entail, giving consideration to the prominence and scope of the original defamatory statement.[190] To avoid any possible first amendment problem in forcing a paper to print a retraction,[191] the publisher would have a choice of paying the full award, or printing the retraction and paying the remaining damage if there is any.

This type of damage structure would provide incentive for publishers to settle with plaintiffs earlier in the litigation process.[192] The longer the time period from the

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183. *See supra* text accompanying notes 58–80.

184. Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 755–56 (1985).

185. *See* Franklin, *A Critique*, *supra* note 136, at 13–14; Smolla, *supra* note 137, at 13–14; Jenkins, *Chilly Days for the Press*, STUDENT LAW., Apr. 1983, at 23, 25.

186. There remains the vexing problem of punitive damages. The time and cost saving elements of this Note's proposal may not be present if an "actual malice" standard is required in order to gain punitive damages. A fuller discussion of this area is beyond the scope of this Note.

187. Currently, a plaintiff can, during discovery, delve into the internal editorial process of the publisher to help determine the standard of care the defendant used. Herbert v. Lando, 441 U.S. 153, 160–77 (1978).

188. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–41 (1983).

189. *See supra* text accompanying note 138.

190. State retraction statutes would also provide an aid in determining the required form for a significant retraction. *See, e.g.*, CAL. CIV. CODE § 48a (West 1954); FLA. STAT. ANN. §§ 770.02, 836.08 (West 1979); OHIO REV. CODE ANN. § 2739.13 (Anderson 1981); OR. REV. STAT. §§ 30.160, .165, .170 (1979). *See generally*, Morris, *Inadvertant Newspaper Libel and Retraction*, 32 ILL. L. REV. 36, 41–44 (1937). *See also*, Note, *infra* note 180, at 530–37 (proposing a retraction statute).

191. Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974) (first amendment prevents state from requiring newspapers to print a reply for Fairness Doctrine reasons).

192. *See* Franklin, *A Critique*, *supra* note 136, at 45.

original publication to the retraction, the greater the surplus damages will be, because a retraction is much less effective in reducing the harm to the plaintiff when a long time has passed since the original defamatory publication.[193]

The heavy burden on the plaintiff on the issue of falsity and the ability of the appellate courts to re-examine the facts on an independent basis would prevent a jury from punishing a defendant merely for publishing unpopular views.[194] This heavy burden will also reduce the chance that a publisher would feel pressured to retract a statement he or she believes to be true in fear of a large damage verdict.

Under the current standard, liability itself is equated with a possible violation of first amendment interests.[195] Because the Court recognized that juries may be punishing unpopular content or simply misapplying the confusing constitutional standard of actual malice, appellate courts have been given the power to independently review the facts of the case to determine whether there was sufficient evidence for the jury's verdict rather than following the "clearly erroneous" standard.[196] Since it is the size of the verdict that actually raises a possible conflict with first amendment interests, courts should take a more active role in reducing oversized damage awards. Appellate courts could be given a similar power to independently review the facts to determine whether there was sufficient evidence to support the damage award.[197] The importance of the constitutional right, and the inherent tendency of juries to violate the right justify granting this extraordinary power to the judges.

Deciding the validity of a damage award, however, raises particular problems in a defamation action. Because presumed damages are allowed, there is no clear standard available to determine the validity of the verdict. There are, however, some guidelines which would enable the courts to assess the harm which the plaintiff has actually suffered. The scope of reception of the defamation, how defamatory the statement actually was, the previous reputation of the defendant, and the type of reputational harm the plaintiff suffered all provide the courts with standards for accepting or reducing a damage award.[198]

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193. *See* W. PROSSER & W. KEETON, TORTS 845–46 (5th ed. 1984); *cf., e.g.*, Linney v. Maton, 13 Tex. 449, 458 (1855) (retraction made immediately after a defamatory comment can totally mitigate the harm).

194. *See* Franklin & Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 864–65 (1984).

195. *See supra* text accompanying notes 32–80.

196. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 509–10 (1984); New York Times v. Sullivan 376 U.S. 254, 285 (1964); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191, 220.

The *Bose* case held that the clearly erroneous standard of FED. R. CIV. P. 52(a) ("Findings of fact shall not be set aside unless clearly erroneous . . . .") does not prescribe the scope of appellate review of a finding of actual malice in a defamation case. The Court held that the first amendment concerns of the defamation area required appellate courts to use independent fact review on the constitutional issue, because the jury's application "is unlikely to be neutral with respect to the content of speech and holds a real danger of becoming an instrument for the suppression of those vehement, caustic, and sometimes unpleasantly sharp attacks, which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 510 (1984).

197. *Cf.* Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 245 (1985) (raising the possibility that courts could apply the *Bose* rationale to reduce jury verdicts at the appellate level).

198. *See* Anderson, *supra* note 2, at 765–66 (1984).

Professor Anderson listed four types of reputational harm: (1) Harm to existing relations; (2) Interference with future relations; (3) Harm to a present favorable public image; and (4) Creating a negative public image for a person who previously had no reputation at all. *Id.*

V. CONCLUSION

The plurality decision in *Greenmoss* restores the common law of defamation where the defamatory statement concerns a private issue, at least as far as presumed and punitive damages are concerned, and possibly even on the issue of liability. However, this step is not enough. Unless the whole *New York Times* framework is overturned, the problems that have plagued the defamation area will continue. The uncertainty of application, and the inherent nature of a cause of action which requires proof of the mental state of the defendant, will continue to raise the legal costs of both bringing and defending a defamation action to unacceptable levels. These costs, along with the possibility of a huge jury verdict, will bring on the "chilling effect" that the *New York Times* standard is supposed to prevent. Plaintiffs who suffer harm will be unable to be compensated in any way, including public vindication, and false facts will remain unexposed to the public except in those limited situations where the plaintiff can prove actual malice.

The standards proposed in this Note would limit the negative first amendment interest of the chilling effect by strictly scrutinizing damage awards and encouraging mitigation by retraction. Positive first amendment interests would be promoted by exposing false facts more readily than the current framework. Plaintiffs would have the ability to at least publicly vindicate their names, and possibly receive some monetary compensation if a retraction would not be sufficient. Thus, these proposals would protect both the important interests of the individual citizen's reputation and the encouragement of an aggressive press.

Douglas R. Matthews